IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID McCULLOUGH,	§	
	§	No. 641, 2009
Defendent Below-Appellant,	§	
	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	I.D. No. 0806033890
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: June 23, 2010
Decided: July 8, 2010

Before **STEELE**, Chief Justice, **BERGER**, and **RIDGELY**, Justices.

O R D E R

This 8th day of July 2010, it appears to the Court that:

(1) Defendant-below David McCullough appeals his convictions of four counts Rape Second Degree.[1] On appeal, McCullough argues that the Superior Court committed plain error by failing to respond to a jury question asking to see the "whole journal" that a witness wrote in prior to accepting the jury's verdict. The record shows that McCullough's trial counsel made tactical decisions regarding the journal and the jury's question that waived any arguable claim of error in this direct appeal. Accordingly, we affirm the judgment of the Superior Court.

[1] 11 *Del. C.* § 772.

(2) McCullough met Ann[2] on MySpace, a social networking website. McCullough contends that Ann's MySpace page said she was nineteen years old. McCullough was twenty-two years old when he met Ann. In March of 2007, they met in person when Ann's mother took her to the movie theater to meet McCullough. She grew concerned after seeing McCullough and Ann leave the theatre together fifteen minutes after entering, confronted them and took Ann home.

(3) McCullough and Ann met in person again shortly after their first meeting in 2007. At trial, Ann testified that during this encounter they "made out." Ann's mother discovered that Ann had met McCullough the second time, and contacted the police. At this time, Ann informed McCullough that she was thirteen years old.

(4) McCullough and Ann continued to communicate via letters and pre-paid cell phones in 2008. In May of 2008, Ann's mother noticed an instant message from McCullough to Ann. At that point, Ann's mother contacted the police. Ann claimed that she and McCullough had engaged in sexual activity on three occasions in 2008. McCullough was then arrested.

(5) During trial, Ann testified that she and McCullough had engaged in sexual activity on three occasions in 2008, after she had informed McCullough that

[2] Due to the nature of this case, a Pseudonym has been assigned.

she was thirteen years old. Ann also testified that she wrote in her journal about the three physical encounters with McCullough in 2008. The State introduced into evidence a photocopy of Ann's journal, which included entries on the dates of the three encounters. The parties agree that the remaining pages of the original journal were blank. McCullough's counsel did not object to the introduction of photocopies of Ann's journal instead of the original journal.

(6) During jury deliberation, the jury sent a note to the trial judge asking: "Can we see the whole journal that [Ann] wrote in?" The judge informed counsel for both parties of the jury note, and indicated that he was inclined to respond "no, [] the entire journal is not in evidence and [the jury] should not speculate as to why that is or what may be in it." Counsel informed the trial judge that the photocopies represented all the information written in the journal, and the only pages not reflected in the photocopies were several blank pages. The trial judge asked both parties if they wished to provide the jury with the actual journal, and McCullough's counsel informed the trial judge that he did not want the original journal introduced as an exhibit. The trial judge then directed the court reporter to perform a search of the testimony to determine if anyone had testified that the photocopies accurately reflected the *whole* journal. As the court reporter was

leaving the courtroom to perform the search, the bailiff informed the court that the jury had reached a verdict.[3]

(7) The trial judge noted for the record that the jury question was never answered and "one can only assume that the jury did not require an answer" to continue its deliberations. The trial judge then asked, "All right, with that said, anything we should take up before we bring in the jury? [Defense counsel]?" Defense counsel responded "no." The jury foreperson announced the guilty verdicts, and each juror was polled at McCullough's request. Each juror affirmed the guilty verdicts. After a presentence investigation, McCullough was sentenced to 40 years imprisonment, followed by 2 years of probation. This appeal followed.

(8) McCullough argues that the trial court committed plain error by not responding to the jury question prior to the jury returning a verdict because the trial judge had a duty to respond when a jury expresses confusion. It is undisputed that McCullough did not object to the Superior Court's acceptance of the jury verdict. Therefore, his argument is waived unless he can demonstrate plain error.[4] "[T]he

---

[3] The judge noted for the record:

> THE COURT: And just to close out the record, as we exited the courtroom, and even before the court reporter was able to get on the elevator to go downstairs to begin the search that she was asked to perform, the bailiffs advised that the jury had returned with a verdict. So, the question was never answered. In fact, there was no further contact with the jury after the note presented to the Court. So, one can only assume that the jury determined it did not require an answer to the question to continue its deliberation.

[4] Supr. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[5] "[T]he error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[6]

(9) It is well-settled that plain error is predicated upon oversight, as opposed to a tactical decision of counsel.[7] McCullough's trial counsel made strategic decisions throughout the trial to prevent the introduction of the original journal in its entirety. He did not object to the introduction of photocopies of the journal entries when the actual journal was available. He expressly objected to providing the actual journal in response to the jury's question during deliberations. Finally, when the trial judge asked McCullough's trial counsel whether there was "anything we should take up before we bring in the jury", he answered "no". By making these tactical decisions at trial, McCullough has waived any arguable claim of error in this direct appeal.[8]

---

[5] *Wainwright*, 504 A.2d at 1100.
[6] *Id*.
[7] *Johnson v. State*, 983 A.2d 904, 923 (Del. 2009); *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006); *Bell v. State*, 1993 WL 169143, at *3 (Del. May 3, 1993).
[8] *Wright v. State*, 980 A.2d 1020, 1024 (Del. 2009).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice